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July 14, 2000

Via HAND DELIVERY
Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals – TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Issues, CS Docket No. 00-96

Dear Ms. Salas:

On behalf of EchoStar Satellite Corporation ("EchoStar"), enclosed please find for filing an original and nine copies of the Comments of EchoStar Satellite Corporation in the above-referenced matter.

Also enclosed is an additional copy of EchoStar's Comments which we ask you to date-stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Rhonda M. Rivens
Counsel for EchoStar Satellite Corporation

Enclosures

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List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 00-96
Broadcast Signal Issues	)	

To: The Commission

COMMENTS OF ECHOSTAR SATELLITE CORPORATION

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Dated: July 14, 2000

SUMMARY

The Commission has declared that "it is the clear intent of both Congress and the Commission to provide satellite subscribers with local television service in as many markets as possible" through the enactment and implementation of the Satellite Home Viewer Improvement Act of 1999.[1] The main challenge posed by the "must carry" rules is the inherent tension between availability of local network signals to as many cities as possible on the one hand, and, on the other, the obligation to carry additional stations, regardless of their popularity to viewers, once a satellite carrier decides to retransmit any local station in a given market.[2] Simply put, the statute poses a stark trade-off: the more stations a satellite carrier has to carry in a given city, the fewer cities it will be able to serve with local network signals. At the same time, EchoStar recognizes that this conundrum inheres in the statute itself, and that the Commission's rules in this matter, while important, can do nothing to change that unfortunate fact.

In EchoStar's view, the statutory must carry obligation infringes upon many of its constitutional rights, including, among others, EchoStar's freedom of speech. EchoStar thus reserves its right to seek judicial evaluation of the facial constitutionality of any provision of SHVIA prior to promulgation of any rules or regulations thereunder.

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[1] Notice of Proposed Rulemaking, *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, CS Docket No. 00-96 (rel. June 9, 2000) at ¶ 2 (hereinafter, "*NPRM*").

[2] The must carry provision of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") requires satellite carriers, by January 1, 2002, to carry upon request all local broadcast stations' signals in local markets in which the satellite carriers carry at least one broadcast station signal. Act of Nov. 29, 1999, Pub. L. No. 106-113, § 1008, 113 Stat. 1501, Appendix I (1999) (to be codified at 47 U.S.C. § 338).

Nor do these statutory provisions leave any leeway for the Commission to salvage them from unconstitutionality, or indeed give the Commission any opportunity to alleviate the burdens they pose through implementation. With respect to commercial broadcast stations, the statute requires satellite carriers to carry upon request the signals of "***all television broadcast stations***" within any local markets served by the satellite carrier.[3]" The SHVIA also mandates that with respect to channel positioning, satellite carriers must retransmit local stations to subscribers in the stations' local market on contiguous channels and must provide access to such stations' signals at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu.[4] Further, the statute prohibits satellite carriers from requesting or accepting monetary payment or other valuable consideration in exchange for mandatory carriage, or for channel positioning rights provided to stations under the must carry obligations.[5]

The Commission can do nothing to mitigate the burdens created by these requirements. On the other hand, the Commission must be mindful not to impose, through regulation, any greater burden than that already imposed by statute, and it is in the spirit of

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[3] 47 U.S.C. § 338(a)(1) (emphasis added). The Commission tacitly acknowledged that satellite must carry requirements are more onerous than those for cable, stating that "a satellite carrier has a general obligation to carry all television stations in a market, if it carries one station in that market through reliance on the statutory license, ***without reference to a channel capacity cap. In contrast***, a cable system with more than 12 usable activated channels is required to devote ***no more than one-third*** of the aggregate number of usable activated channels to local commercial televisions stations that may elect mandatory carriage rights. A cable system is also obligated to carry a certain number of qualified noncommercial educational television stations above the one-third cap." *NPRM* at ¶ 7 (emphasis added).

[4] 47 U.S.C. § 338(d).

[5] 47 U.S.C. § 338(e).

avoiding further exacerbation of already formidable, and moreover, unconstitutional burdens that EchoStar submits these comments.

In that respect, with regard to carriage of ***noncommercial*** stations, SHVIA does give the Commission discretion to limit the satellite carrier's carriage obligations. While the statute instructs that the requirements be comparable to those applicable to cable systems, the Commission has laudably recognized that this standard does not mean mechanical importation of cable must carry rules, but rather adaptation based on the recognition of several fundamental differences between cable and satellite delivery. At the same time, the Commission's list of differences appears to omit the most crucial one: the ***nationwide*** spectrum constraints posed by must carry for satellite carriers. As the Commission knows, to add one local channel in any one local market, EchoStar must currently dedicate one channel's spectrum equivalent throughout the country – in other words, that spectrum becomes unusable for the rest of the country, a very heavy toll on the spectrum limited direct broadcast satellite ("DBS") systems. Even with the deployment of spot beam satellites, the spectrum used to retransmit a broadcast station in any particular city may not be reused in a much broader region of the country. To put this burden in perspective, a cable carrier such as Time Warner would experience a similar burden only if it had to earmark capacity on all of its systems nationwide (or at least in the East Coast region) for each New York station it had to carry. Of course, cable operators do not in fact face similar constraints, and need only devote one channel on a local cable system to accommodate an additional broadcast signal.

In light of this difference, a "sliding-scale" rule such as that applicable to cable systems for carriage of commercial stations would place no limit at all on the obligation of satellite carriers to carry non-commercial channels, since both DBS carriers, like large cable

systems, have many more than 36 channels – the last notch on the sliding scale. At the same time, an unlimited obligation to carry non-commercial stations would be enormously more onerous for satellite carriers than for cable systems, in violation of the standard of "comparability," since for a satellite carrier each additional non-commercial local channel requires capacity to be devoted elsewhere in the country. The Commission must therefore devise a limit on the carriage of non-commercial stations – a limit such that it achieves true equivalence between satellite carriers and cable systems. This limit should be based: first, on observing what toll these obligations constitute ***in fact*** for large cable systems and translating that into a percentage of overall satellite capacity; and, second, on the rule that no city should have a greater claim on a satellite carrier's limited capacity than any other city, subject to exceptions relating to ratings.

In short, EchoStar believes that no more than 2% of a satellite carrier's total channel capacity (*i.e.*, 6 channels nationwide for a system of 300 channels) should be devoted to local noncommercial station carriage. Additionally, a satellite carrier should not have to carry more than one noncommercial station in a particular market (with the choice of market left to the discretion of the satellite carrier), unless a second station in one market has higher ratings than any noncommercial station in another market, in which case the satellite carrier should be able to choose as between the two. Of course, mandatory carriage of noncommercial stations under the must carry rules should count toward satellite carriers' public interest obligation.[6]

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[6] Satellite carriers are already obligated to reserve 4% of channel capacity "exclusively for noncommercial programming of an educational or informational nature." 47 U.S.C. § 335; *See Implementation of Section 25 of the Cable Television and Consumer Protection and Competition Act of 1992 – Direct Broadcast Satellite Public Interest Obligations*, MM Dkt. 93-25, 13 FCC Rcd 23254 (1998) (hereinafter "*DBS Public Interest Obligations*").

With respect to the question of material degradation, it would be ironic for the Commission to impose detailed and exacting standards when households receiving a signal of Grade B intensity as currently defined are deemed to receive a sufficiently good signal and therefore are ineligible for distant satellite service, no matter if the signal happens to be unrecognizably distorted by ghosting. Any standards to be imposed by the Commission should not be more exacting then the Grade B standard as it changes over time. In any event, this is likely an academic question, as digital satellite retransmission of broadcast signals has been far superior to analog over-the-air reception, and to EchoStar's knowledge, no complaints have arisen in that regard. Additionally, the Commission should confirm that the must carry rules do not extend to digital television in light of the difference between the cable and satellite statutory regimes in that respect. Finally, the Commission should avoid heaping even greater burdens upon satellite carriers in its implementation of other aspects of must carry, such as procedures for initiating mandatory carriage.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 00-96
Broadcast Signal Issues	)	

To: The Commission

COMMENTS OF ECHOSTAR SATELLITE CORPORATION

EchoStar Satellite Corporation ("EchoStar") hereby submits its comments on the Commission's development of rules to implement the must carry provision of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA").[1]

THE COMMISSION SHOULD NOT FURTHER EXACERBATE THE ALREADY FORMIDABLE BURDENS IMPOSED BY SHVIA

The must carry requirements of SHVIA impose unjustified and unconstitutional burdens on satellite carriers and Congress has left the Commission with no leeway to mitigate this burden. Therefore, it is important that the Commission not exacerbate the burden where Congress has directed the Commission to promulgate rules to implement the must carry obligations.

[1] The must carry provision of SHVIA requires satellite carriers, by January 1, 2002, to carry upon request all local broadcast stations' signals in local markets in which the satellite carriers carry at least one broadcast station signal. Act of Nov. 29, 1999, Pub. L. No. 106-113, § 1008, 113 Stat. 1501, Appendix I (1999) (to be codified at 47 U.S.C. § 338).

A. Carriage of Noncommercial Stations

Congress given the Commission discretion to prescribe regulations limiting the carriage of "multiple local noncommercial television broadcast stations" under the must carry provision.[2] However, Congress also instructed that "to the extent possible," the regulations should provide for "the same degree of carriage by satellite carriers of such multiple stations as is provided by cable systems. . . ."[3]

In the NPRM, the Commission describes the sliding scale framework of noncommercial educational ("NCE") station carriage obligations for cable and seeks comment on whether a similar framework should be adopted for satellite.[4] An identical framework should ***not*** be imposed upon satellite carriers; this area is a prime example of one in which the imposition of seemingly "identical" requirements would actually impose a far greater burden on satellite carriers than that imposed on cable operators, which ultimately will adversely affect the ability of satellite carriers to compete with other MVPDs.

The key to understanding why a requirement identical to the cable requirement would be so burdensome is, again, the broader geographical implications of local carriage for a

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[2] 47 U.S.C. § 338(c)(2).

[3] *Id.*

[4] The Commission notes that cable operators are obligated to carry NCE's under a framework based on the cable operator's number of usable activated channels. Cable systems with (1) 12 or fewer usable activated channels are required to carry the signal of one qualified local NCE; (2) 13-36 usable activated channels are required to carry no more than three qualified local NCE's; and (3) more than 36 usable activated channels must carry at least three qualified local NCE's. A cable operator with capacity of more than 36 usable activated channels and carrying the signals of three qualified NCE's is not required to carry the signals of additional stations the programming of which substantially duplicates the programming broadcast by another qualified NCE station requesting carriage. *NPRM* at ¶¶ 27-28.

satellite carrier versus a cable system. As explained above, to add one local channel in any one local market, EchoStar must currently dedicate one channel's spectrum equivalent nationwide, thus, that channel becomes unusable for the rest of the country. Nor will the advent of spot beam satellite capability eliminate satellite capacity constraints since satellite carriers will still not be able to reuse the same spectrum within the same geographical region. As an example, a spot beam satellite will permit carriers to beam local transmissions into the New York area while maintaining some ability to reuse that same spectrum in a part of the country distant from New York, for example, a city on the west coast. But once spectrum is used to transmit local signals in New York, the ability to reuse that spectrum in the east coast region is still lost. At best, spot beam capability may prolong the time it takes before a satellite operator loses the ability to accommodate additional broadcast signals due to lack of capacity. Indeed, in implementing the DBS public interest obligations, the Commission was sensitive to the fact that spot beams did not constitute a panacea, and correctly observed, "although spot beam technology is available and could be used to regionalize programming, DBS providers may lack the channel capacity needed to serve all localities across the country."[5]

If must carry obligations for cable were woodenly imposed in this context, satellite carriers with more than 36 usable activated channels might have to carry three NCE signals in each of the local markets they currently serve. Assuming 30 local markets, the carrier would have to dedicate ***90*** channels nationwide to fulfill this obligation. This means at least ***22*** fewer cities for which the carrier would be able to provide local-into-local service, not even taking into account the capacity needed for mandatory carriage of ***commercial*** broadcast

[5] *See DBS Public Interest Obligations*, 13 FCC Rcd 23254, at ¶ 53.

stations. Taking commercial must carry stations into account further reduces the number of cities that can receive local service. Quite simply, the imposition of such a burden will severely limit the number of cities that receive local television service from DBS providers, in direct contravention of the intention of both Congress and the Commission to expand local service "in as many markets as possible."

Moreover, the burden will be inordinately greater than that imposed upon cable operators, in contravention of Congress' direction that the Commission prescribe regulations providing for "the same degree of carriage by satellite carriers of such multiple stations as is provided by cable systems under section 615 [of the Communications Act]."[6] If a satellite carrier were required to devote 90 of its 300 channels, for example, to mandatory carriage of NCEs, that would translate into an astounding ***33%*** of its total channel capacity – a clearly absurd result. This requirement would exceed by far the percentage of large cable systems' capacity that is in fact devoted to carrying NCE broadcasters, as well as the 4% capacity set-aside the Commission deemed appropriate for the nationwide carriage of public interest programming by satellite carriers.

Duplication of cable's sliding scale framework is neither required nor necessary. First, the cable framework is a "statutory paradigm," mandated by Congress.[7] In contrast, Congress has created no mandated framework for satellite must carry; thus, the imposition of a framework identical to that for cable would go beyond the SHVIA requirements. The absence of

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[6] *See* 47 U.S.C. § 338(c)(2).

[7] *NPRM* at ¶ 27 (describing the cable framework as a "statutory paradigm."). The cable carriage framework is set out in 47 U.S.C. § 535(b) and (e).

a mandated framework means the Commission can develop a framework that creates carriage obligations for satellite carriers truly "comparable" to those for cable, while accounting for the crucial differences between the two.

To limit satellite carriers' carriage obligation to the extent it can, and promote the pro-competitive aim of the statute, the Commission should require satellite carriers to devote no more than 2% of channel capacity to carriage of local NCEs as part of the existing 4% capacity set-aside requirement for noncommercial programming of an informational and educational nature. In essence, local carriage of NCE's must be rationed, because failure to do so means that either fewer cities will receive local service, or there will be no capacity in some cities for carriage of an NCE – neither of these outcomes is desirable.

Significantly, this overall upper limit on mandatory local NCE carriage is consistent with the burden cable noncommercial carriage rules pose in fact for large cable systems. To ensure the comparability of this upper limit with cable carriage requirements, the Commission may be guided by the burden those rules impose on large cable systems, and Time Warner Cable's southern Manhattan systems are a good yardstick in that respect. Time Warner Cable of New York City carries 3 broadcast NCEs in the southern Manhattan market.[8] Time Warner Cable's channel capacity in that market exceeds 200 channels.[9] It therefore devotes approximately 1.5 percent of its total capacity to mandatory local NCE carriage. The burden placed upon satellite carriers should be no greater than that on large cable systems; accordingly,

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[8] *Television and Cable Factbook 2000,* Cable Volume 1 (Warren Publishing, Inc., 2000 ed.) at D-1062.

[9] www.twcnyc.com/dtv/whatson.html (visited July 13. 2000). This figure includes Time Warner Cable's digital programming tier and pay-per-view channels.

the upper limit for mandatory carriage of local NCEs by satellite carriers should be set at no more than 2% of channel capacity.[10]

B. Channel Positioning

The Commission has already observed that the statutory provisions governing channel positioning are quite clear, noting: "[t]he statutory directive for channel positioning clearly states that satellite carriers are required to present local broadcast channels to satellite subscribers in an uninterrupted series."[11] This provision does not require the imposition of burdensome regulations to further refine it. Here again, the Commission should seek to avoid imposing additional burdens on satellite carriers through regulation.

Moreover, the must carry complaint process created by SHVIA specifically covers channel positioning.[12] Disputes regarding channel positioning could be effectively addressed through this process, rather than by the promulgation of yet another burdensome set of regulatory specifications.

C. Content To Be Carried

Section 338(g) requires that content obligations for satellite be "comparable" to the requirements for cable operators. Cable operators must carry the primary video, accompanying audio, and line 21 closed caption transmission of each local commercial

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[10] Satellite carriers are already required to calculate and report channel capacities in connection with the existing obligation to reserve 4% of capacity for national educational and informational programming. *DBS Public Interest Obligations*, 13 FCC Rcd 23254, at ¶ 71. Satellite carriers could use the same capacity calculations for purposes of determining the overall upper limit on local must carry obligations.

[11] *NPRM* at ¶ 29.

[12] 47 U.S.C. § 338(f)(1).

television station carried on the cable system and, "to the extent technically feasible, program-related material" carried in the vertical blanking interval or on subcarriers.[13] Identical content requirements exist for each noncommercial television station, except that mandatory carriage of "program-related material," where technically feasible, is limited to that necessary for receipt of programming by handicapped persons or for educational or language purposes.[14] The Commission requests comment on the applicability of these requirements in the satellite context.

In EchoStar's view, broadcasters electing mandatory carriage should not demand more in terms of content than what is acceptable to broadcasters that obtain carriage through retransmission consent. Given their decision to negotiate as opposed to electing mandatory carriage, the latter category of broadcasters obviously have more leverage than those electing must carry. In EchoStar's experience, broadcasters electing retransmission consent typically agree to carriage of primary video, accompanying audio, and to the extent required by law, the line 21 closed caption transmission. The carriage content arrived at through arm's-length negotiation by satellite carriers and broadcasters represents a proper, practical guideline for the Commission to follow in mandating content requirements. Moreover, these content requirements are comparable to those for cable.

D. Material Degradation

As with other aspects of must carry, Congress has required that standards for material degradation be "comparable" to those for cable operators. The Commission has created very complex, highly detailed rules to govern signal degradation matters in the cable context. It

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[13] *NPRM* at ¶ 31 (citing 47 U.S.C. § 534(b)(3)).

[14] *Id.* (citing 47 U.S.C. § 535(g)(1)).

would be ironic, however, for the Commission to impose detailed and exacting standards in the satellite context when households receiving a signal of Grade B intensity as currently defined are deemed to receive a sufficiently good signal and therefore are ineligible for distant satellite service, no matter if the signal happens to be unrecognizably distorted by ghosting.[15] Any standards to be imposed by the Commission cannot be more exacting then the Grade B standard as it changes over time. In any event, this is likely an academic question, as digital satellite retransmission of broadcast signals has been far superior to analog over-the-air reception, and to EchoStar's knowledge, no complaints have arisen in that regard. In sum, the Commission need not create a burdensome set of rules of complexity identical to the rules for cable simply to assure that material degradation standards for satellite are comparable to cable standards. Rather, the Commission should adopt the same standard of Grade B intensity that applies to determine whether a consumer receives an adequate signal over the air, as that signal changes from time to time.

E. Digital Television

The Commission seeks comment on whether it should impose a requirement that satellite carriers "carry digital broadcast television signals in addition to analog signals up until the time that television stations return their analog spectrum to the government."[16] The answer is an emphatic "no."

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[15] *See In the Matter of Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations*, ET Docket No. 00-11, at ¶ 19 (rel. May 26, 2000) (declining to address issues of ghosting and signal quality generally, in context of defining households "eligible" to receive distant signals via satellite).

[16] *NPRM* at ¶ 48.

This answer is compelled, first, by the differences between the cable and satellite statutory regimes regarding digital must carry. The statutory must carry provisions for cable explicitly directed the Commission to develop must carry rules for "advanced television" once the Commission prescribed modifications for television broadcast signals.[17] In contrast, no explicit directive is present in the statutory provisions for satellite must carry.[18] Significantly, Congress pointedly declined to take a position on the necessity of digital must carry requirements for either satellite or cable.[19] And although an earlier version of SHVIA explicitly excluded digital signals from the satellite must carry requirements, the Commission should not interpret the elimination of this exclusion from the final bill as an indication that Congress intended for must carry to apply to digital signals.

Second, while Congress directed the Commission to include requirements for satellite must carry that are "comparable" to the cable requirements in Section 614(b)(4) of the Communications Act, which covers "advanced television," Congress also directed the Commission to issue regulations implementing the satellite must carry obligations within one

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[17] *See* 47 U.S.C. § 534(b)(4)(B) ("[a]t such time as the Commission prescribes modifications for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have changed to conform with such modified standards.").

[18] *See* 47 U.S.C. § 338(g), which calls for the promulgation of regulations "comparable" to those for cable under Section 614(b)(4) of the Communications Act.

[19] *See* Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong., 145 Cong. Rec. at H11795, (daily ed. Nov. 9, 1999) ("by directing the FCC to promulgate these [satellite] must carry rules, the conferees do not take any position regarding the application of must carry rules to carriage of digital television signals by either cable or satellite systems.") (hereinafter, "Conf. Rep.").

year of the November 29, 1999 enactment of SHVIA.[20] What Congress intended, by directing the Commission to promulgate regulations within one year, was for the Commission to issue regulations comparable to those currently in existence – not to issue regulations based on what the Commission may or will do in the future regarding cable. In short, although the Commission is considering several options regarding the imposition of must carry for digital signals, there is currently no digital must carry requirement for cable.[21] Therefore, to impose "comparable" regulations on satellite carriers, the Commission cannot impose digital must carry obligations on satellite. To do so would exceed the statutory obligation imposed by SHVIA, and would also exponentially increase the already unconstitutional burdens imposed upon satellite carriers by the SHVIA must carry provisions.

Third, as the Commission already intimates, a dual carriage rule requirement would limit the number of markets satellite carriers can serve with analog signals alone.[22] For a satellite carrier, each additional digital signal would require the dedication of nationwide capacity on the satellite system, reducing the carrier's capacity to carry signals of either type.[23]

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[20] 47 U.S.C. § 338(g).

[21] *See NPRM* at ¶ 47 (citing Notice of Proposed Rulemaking, *Digital Broadcast Signal Issues*, 13 FCC Rcd 15092 (1998)).

[22] *NPRM* at ¶ 48 (questioning whether a dual carriage rule would limit the number of markets satellite carriers can serve with analog signals alone.)

[23] Even if the Commission instituted a digital must carry requirement for satellite based on the misguided theory that such a requirement would be "comparable" to the requirements for cable, a dual carriage requirement would nonetheless be unjustified, for as the cable industry has already observed, the cable must carry obligations require carriage of only one signal, not both. *See, e.g.*, Reply Comments of the National Cable Television Association, Notice of Proposed Rulemaking, *In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120 (filed Dec. 22, 1998) at 7-12 (arguing that dual carriage is not contemplated by the terms of the cable must carry statute); Comments of the Cable

(Continued ...)

Therefore, the imposition of such a burden would be inconsistent with the intention of Congress and the Commission to expand local satellite service to as many subscribers as possible.

Finally, such a requirement would impose an even greater burden on satellite carriers than on cable operators: by agreeing to carry the digital signals of broadcast stations, a cable operator would, again, be merely agreeing to add one channel to each of its systems. For a satellite carrier, the spectrum expenditure would be so severe as to be impossible to meet. To impose a greater burden on satellite than cable operators would be inconsistent with Congress' directive that the Commission impose "comparable" obligations on satellite and cable.

F. The Commission Should Refrain from Creating Additional Burdens

a. The Meaning of "Carry Upon Request"

The Commission seeks comment on the procedural means of initiating mandatory carriage, noting that it initially required cable operators "to contact all local broadcast television stations, in writing, on matters related to their carriage rights" once any local station in a particular market was being carried.[24] The Commission also seeks comment on the adoption of a host of other procedural rules, such as separate procedural rules for initiating mandatory carriage

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Telecommunications Association, Notice of Proposed Rulemaking, *In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120 (filed Oct. 13, 1998) at 11-14. Thus, a broadcaster's digital signal is not entitled to must carry rights during the transition to digital and consequently, digital signals can only be carried pursuant to retransmission consent. Indeed, the dual carriage regime proposed by the Commission would give broadcasters far more than what they are entitled to under must carry. Under dual carriage, broadcasters would presumably seek separate elections for their digital signals, for example, demanding mandatory carriage of digital signals and retransmission consent for analog, or vice versa. However, the Commission would exceed its authority under the must carry statutes by bestowing such largesse upon broadcasters, because Congress extended this choice ***only*** to analog commercial broadcast signals; it did not extend the choice to every signal of every broadcast station.

[24] *Id.* at ¶ 11.

of NCEs, for new broadcast stations that may commence operation in a market, and for new satellite carriers.[25]

In the interest of minimizing the burden that satellite carriers already face as a result of the must carry rules, EchoStar respectfully suggests that the Commission adopt the simplest, most straightforward procedure. As the statute itself mandates,[26] broadcasters should be required to contact satellite carriers in the first instance, in writing, to request mandatory carriage, consistent with the election rules that are the subject of another rulemaking. The Commission's existing election procedures would then apply from that point.

There are only very few DBS satellite carriers. Broadcasters all know who the DBS carriers are, and they all know when DBS operators begin to serve their market. In contrast, there are myriad broadcasters in the sum total of the local markets served by satellite carriers, making an obligation to notify all of them impractical. The simplest, least burdensome procedure, from EchoStar's perspective, is for broadcasters to contact satellite carriers consistent with the Commission's election rules.

Here again, there is no statutory requirement that the Commission impose any particular notification procedure. Therefore, the Commission should not create additional burdens, especially where no particular rules are required by statute.

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[25] *Id.*

[26] *See* 47 U.S.C. § 338(a) (a satellite carrier shall carry "***upon request***" the signals of all television broadcast stations located within that local market) (emphasis added).

b. Selection of Reception Points

Section 338(b)(1) of the Act requires that television station broadcasters bear the costs associated with delivery of their signal to the satellite operator's "local receive facility" or to its non-local receive facility, provided the latter location is agreed to by at least 50% of the television stations in the local market. The Commission seeks comment on the term "local receive facility" and the meaning of the statutory phrase "to another facility that is acceptable to at least one-half of the stations asserting the right to carriage in the local market."[27] Although the statute gives the Commission no latitude in terms of allocating the costs associated with delivery of must carry signals between broadcasters and satellite carriers, the Commission should not interpret these terms in a manner that further exacerbates the burden imposed upon satellite carriers by this statutory requirement.

The technical configurations for local station uplink and distribution that may be required by satellite operators can be expected to vary greatly from market to market. Locating reception points is a part of the "unique technical challenges on satellite technology" recognized by Congress.[28] These technical challenges necessitate that satellite carriers be given reasonable flexibility in configuring their systems.

The Commission acknowledges that one feasible means available to satellite carriers to collect broadcast signals from television markets nationwide is likely to be strategic aggregation of signals on a regional basis, with the "'local receive facility' . . . co-located at [sic]

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[27] *NPRM* at ¶ 18-19.

[28] Conf. Rep. at H11795.

suitable carrier's switching center or 'point of presence.'"[29] However, the Commission should be mindful that a satellite carrier's costs for delivering the signal "over the facilities of an interstate telecommunications carrier to the uplink site(s)" would disproportionately exceed any delivery costs that a cable operator bears for carrying must carry signals in local markets, adversely affecting satellite carriers' ability to compete with other MVPDs. For this reason, satellite carriers should be given maximum latitude and discretion under the Commission's rules to designate the location of receive facilities.

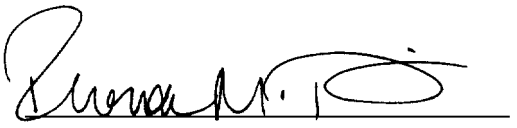
[29] *NPRM* at ¶ 18.

CONCLUSION

In conclusion, EchoStar believes that SHVIA must carry is unconstitutional for several reasons. The unconstitutionality of these carriage obligations is beyond the Commission's control to change or ameliorate in this rulemaking. Nonetheless, EchoStar urges the Commission not to create further burdens for satellite carriers.

Respectfully submitted,

EchoStar Satellite Corporation



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